

STATE OF MICHIGAN
COURT OF APPEALS

NORTHEAST FINANCIAL CORPORATION,
d/b/a COUNTRY HOMES, INC.,

UNPUBLISHED
October 15, 1999

Plaintiff-Appellant,

v

No. 209486
Oakland Circuit Court
LC No. 96-522224 CH

ROSE TOWNSHIP,

Defendant-Appellee,

and

GEORGE W. TOBIAS and THOMAS J. TOBIAS,

Intervenor-Defendants.

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion and order granting defendants' motions for summary disposition and denying plaintiff's motion for summary disposition. We affirm.

Plaintiff entered into a contingent agreement to purchase approximately three hundred acres of land in Rose Township that was zoned for agricultural use. The agreement was contingent on plaintiff's ability to have the property rezoned for development as a mobile home park. Plaintiff applied to have the property rezoned as follows: 240 acres for mobile home subdivision; 64 acres for single family residential; and 3.5 acres for general business ("C-2").

The Township Planning Commission held a public hearing and subsequently denied plaintiff's rezoning requests. The Oakland County Planning Commission waived their right to review the requests, but noted that the area was only marginally suited for septic systems that would be required to accommodate the requested rezoning development. The rezoning requests went before the Township Board, which adopted the reasoning of the Township Planning Commission and denied the requests.

Plaintiff filed suit against the Township alleging separate counts of (1) taking/inverse condemnation, (2) unreasonable and arbitrary zoning in violation of the right to due process, and (3) exclusionary zoning.¹ On cross motions for summary disposition, the trial court granted defendants' motion for summary disposition and denied plaintiff's motion for summary disposition.

I. Taking

Plaintiff first contends that the trial court erred in holding that a taking had not been established. We disagree. A trial court's ruling on a constitutional challenge to a zoning ordinance is reviewed de novo. *Jott, Inc v Clinton Twp*, 224 Mich App 513, 525; 569 NW2d 941 (1997). An ordinance is presumed to be valid, and the plaintiff has the burden of proof in demonstrating that a regulatory taking has occurred. *Bevan v Brandon Twp*, 438 Mich 385, 405; 475 NW2d 37, amended 439 Mich 1202 (1991).

In *Carabell v Dep't of Natural Resources*, 191 Mich App 610, 612-613; 478 NW2d 675 (1991), this Court set forth the test to determine whether a taking of property has occurred:

What type of government action will constitute a taking is essentially an ad hoc inquiry. The factors to be considered in determining whether application of a land-use regulation to a particular piece of property is a taking include the economic impact of the regulation on the property owner, particularly the extent to which the regulation interferes with "distinct investment-backed expectations," and the character of the government action. The test, in pertinent part, looks to whether the regulation deprives the owner of an economically viable use of his land. The mere fact that a regulation deprives the owner of the most profitable use of his property does not necessarily establish the owner's right to just compensation. [Citations omitted.]

In this case, plaintiff presented the report of an expert who compared the value of the property if developed as a mobile home park to the value if developed with only one house per ten acre lot as it is currently zoned. The expert concluded that the "best use" (i.e. the most profitable use) of the land was to develop it as a mobile home park. However, mere diminution in value does not amount to a taking, *Bevan, supra* at 402-403. Significantly, the expert's opinion did not consider whether there were any other economically viable uses of the land under the current agricultural use zoning. The expert's report failed to create a question of fact as to whether the agricultural use zoning deprived plaintiff of an economically viable use of the land. Therefore, we cannot conclude that the trial court erred in granting defendants' motion for summary disposition as to the taking claim.

II. Due Process

Plaintiff next argues that the trial court erred in granting summary disposition to defendants on the claim of arbitrary and capricious zoning in violation of the right to due process. We disagree. In

Kropf v City of Sterling Heights, 391 Mich 139, 160-161; 215 NW2d 179 (1974), the Supreme Court set forth the test to determine if zoning is arbitrary and capricious:

This Court and the Supreme Court in *Euclid*, *supra*, [*Euclid Village v Ambler Realty Co*, 272 US 365; 47 S Ct 115; 71 L Ed 303 (1926)] has set forth several rational reasons a city may have in excluding other uses from a particular piece of property. It is presumed that the city acted for such reasons, or for any other valid reasons, in enacting a particular ordinance. To show arbitrariness and capriciousness on the part of the city, plaintiffs must show that it did not so act, or that no such grounds reasonably exist with respect to the instant parcel.

Courts do not sit as a superzoning commission and will not second guess local governing bodies in the absence of evidence demonstrating that the governing body was arbitrary and capricious in excluding property from other uses. *Id.* The Township Board and the Planning Commission gave the following reasons for denying plaintiff's application for rezoning to mobile home subdivision:

1. The proposed change in zoning is inconsistent with the Master Plan adopted by the Township and affirmed in 1993.
2. The proposed change is inconsistent with the prevailing development pattern in the area.
3. The absence of public water and sewer systems, and the current and planned roadways in the area make this site unsuitable for the densities permitted in the requested zoning district.
4. The residential uses proposed by the applicant can be accommodated in other areas of the Township already zoned for higher densities, which further allow clustered housing options available under the Township Zoning Ordinance.
5. The applicant has not demonstrated that the property cannot be developed as provided in the Master Plan and current zoning.

Plaintiff failed to establish that the reasons given for denial were arbitrary and capricious. Although the third reason given for denial is a moot point because there are no public water or sewer systems in the Township, the other four reasons were valid concerns for the Township to consider in making its decision to deny plaintiff's application for rezoning. There was undisputed testimony from several Board Members and Planning Commissioners that the primary reason this request was denied was because it was inconsistent with the prevailing use in the area and such development would be more appropriate in or near other areas of the Township that were already zoned for higher density population. Trying to ensure orderly residential development that is compatible with and preserves the rural character of the Township is a legitimate interest for the Board to consider. The density recommendations in the Master Plan called for future areas of single family residential, multiple family

residential and mobile home subdivision land uses to be concentrated in more densely populated areas near major traffic arteries and away from the less populated rural and agricultural areas. Placing a high density residential development in the middle of an area that is still being used for agricultural purposes would have been inconsistent with the Master Plan. Thus, we cannot conclude that the Township's decision was arbitrary and capricious.

Plaintiff also claims that the decision was arbitrary and capricious because there was no designation for additional mobile home subdivision zoning on the Master Plan map. Review of the zoning ordinance reveals that it permits mobile home subdivision districts. In fact, when plaintiff's application was filed there were already 65 acres of land zoned for mobile home subdivision, which were fully developed. Additionally, the Master Plan projected that a total of 260 acres would eventually be zoned and developed as a mobile home subdivision in the Township. The Master Plan map did not designate which areas would be rezoned mobile home subdivision, but such rezoning was contemplated in the Master Plan.

Plaintiff further contends that the decision to deny the rezoning to single family residential and C-2 was arbitrary and capricious. However, there was testimony that the Township Board considered all of the applications to be tied together and if the mobile home subdivision zoning were denied the others would not go forward. With regard to the commercial zoning in particular, without the added population of the mobile home park, there would be insufficient need for commercial zoning in that area at that time.

Based on these facts, we find that the trial court did not err in granting defendants' motion for summary disposition as to the due process claim.

III. Exclusionary Zoning

Plaintiff next contends that the trial court erred in granting summary disposition as to plaintiff's claim of exclusionary zoning. The following proofs must be established to sustain a claim of exclusionary zoning: "[a] zoning ordinance may not totally exclude a land use where (1) there is a demonstrated need for that land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful." *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 698; 694; ___ NW2d ___ (1999), quoting *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 32; 448 NW2d 727 (1989). Plaintiff has the burden of proving a demonstrated need for the land use. *Adams*, *supra* at 694. While the plaintiff, in *Adams*, demonstrated a demand for advertising space on billboards which served the plaintiff's private economic self-interest, the plaintiff failed to demonstrate the public need for new billboards. *Id.* at 699.

In the present case, we cannot conclude that mobile home subdivision zoning was totally excluded within the Township. Significantly, there were already 65 acres of mobile home subdivision zoned land being utilized in the Township at the time plaintiff applied for rezoning. Moreover, the decision to deny plaintiff's request applied only to this particular parcel of land and would not preclude the future development of a mobile home park elsewhere in the Township where high density housing would be more compatible with the existing pattern of development.

In previous cases where courts have found rezoning denials to be exclusionary, the municipalities had denied numerous requests for mobile home parks. *See Nickola v Grand Blanc Twp*, 394 Mich 589, 612; 232 NW2d 604 (1975); *Smookler v Wheatfield Twp*, 394 Mich 574, 579; 232 NW2d 616 (1975); *Dequindre Development Co v Charter Twp of Warren*, 359 Mich 634, 639; 103 NW2d 600 (1960). Unlike *Nickola*, *Smookler* and *Dequindre*, there is no suggestion that the Township has refused all new applications for mobile home use, making the prospect of future mobile home park development elsewhere in the Township illusory. In fact, one Board Member testified that this was the first request for mobile home subdivision zoning the Township Board had considered since he joined the Board in 1985. Thus, we cannot conclude that there was a preconceived plan to exclude mobile home parks from the Township.²

Accordingly, we find that the trial court did not err in granting defendant township's motion for summary disposition as to the exclusionary zoning claim.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Jeffrey G. Collins

¹ Neighboring landowners, George Tobias and Thomas Tobias, joined in the action as intervening defendants and joined with the Township seeking summary disposition of plaintiff's claims. Intervening defendants have not filed an appearance in the instant appeal.

² Even assuming that total exclusion was established, plaintiff failed to establish a demonstrated need of the residents of Rose Township for development of a mobile home park. The expert's report established that there was demand in the area, but it did not necessarily demonstrate a public need for a mobile home park in Rose Township. In the 1960s and 1970s when suburbs were starting to be developed, public policy focused on the availability of affordable housing in Metropolitan Detroit. Public policy now focuses on the detrimental effects urban sprawl is having on our wetlands, farmlands and urban areas. More and more people are moving out of urban areas to outlying areas like Rose Township. There is no evidence to suggest that there is a shortage of low cost housing for current residents of Rose Township and the surrounding area. Nor was there an analysis of the availability of low cost housing in more populated areas of Metropolitan Detroit to accommodate the need instead of adding to the effects of urban sprawl. Thus, even if plaintiff had proven total exclusion, we would find that plaintiff failed to demonstrate need, as opposed to demand, for mobile home parks in the Township.